Supreme Court, U.S.
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No. 02-397

IN THE

Supreme Court of the United States

DELOITTE & TOUCHE LLP, ET AL.,

Petitioners,

v.

GABRIEL DIRIENZO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

BRAD S. KARP
MICHAEL E. GERTZMAN
ANDREW TAUBER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, N.Y. 10019-6064
(212) 373-3000
Counsel for the Underwriter Petitioners

JACK M. WEISS
Counsel of Record
JOHN T. BEHRENDT
MARSHALL R. KING
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, N.Y. 10166-0193
(212) 351-4000
Counsel for Petitioner Deloitte & Touche LLP

CHARLES W. SCHWARTZ
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, TX 77002-6760
(713) 758-2222
Counsel for Petitioner William E. Haynes

THOMAS G. HUNGAR
PAUL DECAMP
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500
Counsel for Petitioner Deloitte & Touche LLP

Additional Counsel Listed On Inside Cover

GERALD A. NOVACK
DAVID S. VERSFELT
KIRKPATRICK & LOCKHART LLP
599 Lexington Avenue
New York, N.Y. 10022-6030
(212) 536-3900

Counsel for Petitioners Allen Fracassi, Philip Fracassi, Marvin Boughton, John Woodcroft, and Colin H. Soule

MICHAEL S. FELDBERG
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, N.Y. 10022
(212) 756-2000

Counsel for Petitioner Norman Foster

STUART L. SHAPIRO
MICHAEL I. ALLEN
SHAPIRO MITCHELL FORMAN
ALLEN & MILLER LLP
380 Madison Avenue
New York, N.Y. 10017
(212) 972-4900

Counsel for Petitioners Howard L. Beck, Ray Cairns, Derrick Rolfe, Felix Pardo, and Herman Turkstra

CRAIG R. SMYSER
SMYSER KAPLAN & VESELKA LLP
2300 NationsBank Center
700 Louisiana Street
Houston, TX 77002
(713) 221-2300

Counsel for Petitioner Robert L. Knauss

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REPLY BRIEF FOR PETITIONER

As the petition makes clear, the court of appeals deviated substantially from the decisions of this Court and of ten other circuits. Those other circuits analyze *forum non conveniens* motions by first determining, based on a small number of objective factors, whether to give either full or limited deference to a plaintiff's choice of forum, then balancing the relevant objective public and private interest factors. The court below eschewed that straightforward analysis in favor of a motives-based, sliding-scale approach that considers a potentially limitless range of subjective factors at the initial stage of determining the degree of deference a court should afford a plaintiff's choice of forum.

Respondents' opposition rests on two core premises. Both are demonstrably erroneous. First, respondents contend that this Court's *forum non conveniens* decisions use the same motives-based approach as that employed by the court below. In the fifty-five years since *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), were decided, however, neither this Court nor any other federal court has embraced the Second Circuit's motives-based approach to *forum non conveniens*. This Court's decisions expressly reject the parties' supposed motives as a subject for the *forum non conveniens* inquiry, and the decision below directly conflicts with the law of ten other circuits.

Second, respondents argue, in effect, that the court of appeals' motives-based approach amounts to no more than extraneous dictum. According to respondents, the court of appeals, in reversing the district court, in fact applied diminished deference to the respondents' choice of forum and thereby reached the same conclusion as a proper inquiry—i.e., one taking into account respondents' representative and partially foreign status—would have yielded.

This argument, however, seriously mischaracterizes the opinion below. Contrary to respondents' contention, the court of appeals did not hold that respondents' choice of forum should receive diminished deference because of respondents' representative or partially foreign status or that the district court erred by failing "to accord *any* deference" at all to respondents' choice of forum. Opp. 22 (emphasis added). Rather, relying directly upon its unique motives-based analysis, the court of appeals applied full, undiminished deference and reversed the district court for purportedly failing to give *sufficient* deference to respondents' choice of forum. Pet. App. 12a, 14a, 19a. Thus the court of appeals' novel motives-based approach is the linchpin of the judgment below.[1]

The decision below creates substantial uncertainty concerning how to determine the deference due a plaintiff's choice of forum. This Court's review is essential to bring clarity to this important issue of federal law.

I. This Court's Decisions Do Not Support A Motives-Based Test For Determining The Deference Due A Plaintiff's Choice Of Forum

1. Confronted with the Second Circuit's unprecedented motives-based approach to determining the deference due to a plaintiff's choice of forum, respondents contend that this Court's *forum non conveniens* decisions endorse a motives-based approach to evaluating deference. Opp. 16-21. This argument, however, is directly contradicted by the opinions themselves. First, neither *Gilbert*, nor *Koster*, nor *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), nor any other decision of this Court adopts or even suggests approval of a motives-based standard. To the contrary, those decisions all confirm that the focus of *forum non conveniens* analysis is

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[1] Evident also in the court of appeals' application of full deference was its refusal to apply the *Koster* principle that diminished deference is due when, as here, plaintiffs sue in a representative capacity.

convenience, not the parties' state of mind. "[T]he ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Koster*, 330 U.S. at 527. "[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient . . . ." *Piper*, 454 U.S. at 256.[2] The court below, by contrast, ignored convenience in resolving the deference question, focusing instead on whether respondents "had an improper motive in bringing suit" in New York. Pet. App. 10a.

Second, in *Piper*, this Court expressly *rejected* the motives-based analysis adopted below and that respondents advocate here. "We recognize, of course, that Piper and Hartzell may be engaged in reverse forum-shopping. However, this possibility ordinarily should not enter into a trial court's analysis of the private interests." *Id.* at 252 n.19. "If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum." *Id.*

Third, as this case illustrates[3], the inquiry into motives presents "substantial practical problems" that this Court's

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[2] Respondents misperceive the significance of the *Piper* Court's citation of *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932). Far from indicating a reliance on parties' motives in selecting a forum, as respondents suggest (Opp. 17), the Court in *Piper* relied on *Canada Malting* solely for the proposition that a change in the substantive law should not receive substantial weight in the *forum non conveniens* analysis. *Canada Malting* itself contains no discussion of the deference due a plaintiff's choice of forum, and the question presented there was whether a federal court sitting in admiralty had the discretion to dismiss a case between foreigners concerning a collision in United States territorial waters. *Canada Malting* thus lends further support to the principle that convenience, not motive, drives *forum non conveniens* analysis.

[3] In an effort to shore up the court of appeals' treatment of petitioners' motives as suspect, respondents selectively quote from briefing sub-

forum non conveniens jurisprudence carefully seeks to avoid. *Piper*, 454 U.S. at 251. In *Piper*, the Court excluded consideration of the parties' substantive law preferences from the *forum non conveniens* mix because considering those preferences would embroil the courts in "complex exercises in comparative law." *Id.* Those exercises are as naught compared to the free-form subjective inquiry into motives mandated by the Second Circuit in this case. Contrary to respondents' contention, then, *Piper* does not support a motives test; indeed, it is flatly inconsistent with that approach.

Finally, respondents seize upon passing references in *Gilbert* to the risk that a plaintiff might take advantage of liberal jurisdiction and venue provisions to "harass" a defendant, as well as verbiage in *Koster* suggesting that plaintiffs could present no reasons of convenience for proceeding in their chosen forum. Far from supporting a motives standard, however, these snippets point precisely the other way. In neither case did the Court incorporate any consideration of plaintiff's state of mind into either the *Gilbert* private and public interest factors or the threshold determination of the deference due to plaintiff's choice of forum. Thus, even putting aside *Piper*'s express rejection of the parties' motives as a relevant consideration, the isolated references to the parties' state of mind quoted by respondents only serve to show that the Court excluded these nebulous considerations from the legal standard it prescribed.

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mitted to the JPML. Respondents misleadingly assert that some of the petitioners "desire[d] to have the litigation centered in the Southern District of New York." Opp. 12 & n.10. In fact, as noted in the petition, certain petitioners contended before the JPML that *if* consolidated pretrial proceedings were to be held in the United States, then New York was the best *domestic* forum for such proceedings, although Ontario was more convenient than New York and had the greatest connection to this litigation. Pet. 24 n.11. As noted in the petition, petitioner Deloitte & Touche LLP did not even join in the MDL motion or briefing, but was tarred with the same brush as the other petitioners. Pet. 23 n.11.

In short, contrary to respondents' contentions, this Court's opinions cannot be reconciled with the motives-based standard applied by the court of appeals.[4]

2. As demonstrated in the petition, determining how much deference a plaintiff's choice of forum should receive is distinct from the balancing of convenience factors that occurs later in the *forum non conveniens* analysis. Pet. 17-22. With the exception of the Second Circuit, federal appellate courts are uniform in employing only objective factors to determine whether to apply full deference under *Gilbert*[5] or limited deference under *Koster* and *Piper*. Pet. 17-22.

Respondents' efforts to show that there is no circuit split on the issue of objective versus subjective criteria (Opp. 19-21) are unavailing. First, respondents' assertion that no other circuits have considered the ruling below (Opp. 20) is irrelevant, given that the decision is only a few months old. Sec-

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[4] Respondents' reliance on *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), for the proposition that "while Petitioners take issue with the Second Circuit's noting of their possible forum shopping motives below, other Circuits do the same and even weigh this consideration more heavily" (Opp. 22) is puzzling. The court in *Pain* noted that in resolving *forum non conveniens* motions courts should "avoid implicitly sanctioning forum shopping by either litigant," 637 F.2d at 784; *see* Opp. 22. But that statement clearly appears in the context of a discussion of the history and policies underlying *forum non conveniens* doctrine. Far from giving any weight to subjective considerations, let alone "weigh[ing] this consideration more heavily" than did the Second Circuit, the court in *Pain* affirmed a *forum non conveniens* dismissal based on objective convenience factors *even though* it was "fully aware of the possibility that defendant here may in fact be engaging in a subtle form of 'reverse forum-shopping.'" 637 F.2d at 793.

[5] Respondents inexplicably assert that "[i]n *Gilbert*, this Court gave limited deference to plaintiff's choice of forum." Opp. 21 n.11. Respondents are incorrect. After giving full deference, by requiring a showing that the convenience factors weigh "strongly in favor" of dismissal, the Court reversed the Second Circuit and held that the district court's dismissal was appropriate. *Gilbert*, 330 U.S. at 509-12.

ond, respondents' discussion of two of the cases petitioners cited to demonstrate the circuit split (Opp. 20-21) fails to indicate why those cases are not, as cited, directly contrary to the motives-based approach of the Second Circuit. Those cases, plus the cited decisions of *eight other circuits* that respondents conveniently ignore, demonstrate quite clearly that appeals courts outside the Second Circuit have consistently applied either full or limited deference to a plaintiff's choice of forum, depending on whether the plaintiff was a forum resident or was suing in a representative capacity. Pet. 20-22. Thus, respondents fail to offer any plausible explanation for why this Court should not resolve the clear split of authority on this important issue of federal procedural law.

3. As a policy matter, the approach followed by this Court and ten circuits is vastly superior to that used below by the Second Circuit. Although respondents contend that this two-tier approach to deference would "deprive district courts of the 'flexibility' of the *forum non conveniens* analysis that this Court has found to be 'so valuable'" (Opp. 19 (citation omitted)), it is actually the ruling of the court below that undermines flexibility in deciding *forum non conveniens* motions. The decision below treats respondents' desire to have a United States court apply United States law as a key consideration weighing in favor of strong deference to their forum choice, as well as a critical public interest factor to which strong deference applies. At the same time, the decision below disregards established factors mandated by this Court as undermining any presumption of genuine convenience, such as the respondents' representative status and many respondents' foreign residence. This combination of overweighing and underweighing key considerations virtually ensures that transnational class actions with more than a de minimis connection to the United States will be litigated here. Some such actions, no doubt, should be litigated here, but not in the numbers that the Second Circuit's test will require, and certainly not for the reasons it has identified.

In contrast, the approach followed by this Court and ten other circuits commits that determination to the sound discretion of the district court. The district court properly afforded *some* weight to the interest of the United States in having its securities laws applied (Pet. App. 96a-98a), though not the virtually dispositive weight given it by the Second Circuit.[6] *Forum non conveniens* analysis can and should be flexible, but it must be based on the proper factors, and it must respect the discretion of the district court to weigh the public and private interests to evaluate *convenience*—not plaintiffs' preference for this country's substantive law.

II. Review Is Warranted To Resolve The Conflict Over The Deference Owed To A Class Action Plaintiff's Choice Of Forum

1. Secondarily, petitioners urge the Court to grant certiorari to review the conflict between this Court's *Koster* holding that the forum choice of representative plaintiffs must be afforded diminished deference and the court of appeals' holding here affording full deference to class plaintiffs' choice of forum. Although respondents assert that the Second Circuit "afforded the plaintiffs 'less deference'" in their choice of forum (Opp. 21), that view is flatly refuted by the record. The court below required petitioners to establish that the balance of convenience factors "strongly favors" dismissal and that "a trial in the United States would be so oppressive and

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[6] Respondents note that the Second Circuit held that the district court's balancing of the public interest factors was "clearly erroneous" because it purportedly failed to recognize the connections this case has to the United States. Opp. 22. The district court opinion plainly considered and addressed these points, however, including the express recognition that "PSC stock traded heavily on American stock exchanges and that many of the company's shareholders are U.S. citizens." Pet. App. 97a. Indeed, Judge Cabranes continued to dissent from the majority's reweighing of the district court's evaluation of the private and public interest factors. Pet. App. 21a-22a.

vexatious to them as to be out of all proportion to [respondents'] convenience." Pet. 10-11; Pet. App. 12a, 14a. As shown in the petition (Pet. 18, 26-27), that standard is precisely the standard for *undiminished* deference articulated in *Gilbert* and *Koster*. Indeed, where, as here, the putative class includes a substantial number of foreign citizens, as well as a substantial number of United States citizens who reside outside the forum, it is doubly inappropriate to afford the plaintiff's choice of forum full *Gilbert* deference.[7]

2. Respondents then suggest that certiorari should not be granted because the decision below is consistent with *Koster*. Opp. 23-24. As demonstrated above, however, *Koster* assigned only limited deference to the forum choice of a representative plaintiff. That decision conflicts with the Second Circuit's decision applying strong deference and requiring petitioners to show that the balance of convenience "strongly

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[7] Unlike respondents, the district courts are having no difficulty perceiving that the Second Circuit now applies a motives-based test for deference that trumps this Court's *Koster* holding on a plaintiff's representative status and requires strong deference to class plaintiffs' choice of forum. *See, e.g., In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 296-97 (E.D.N.Y. 2002); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, — F. Supp. 2d —, No. MDL 1374, M21-89 (MBM), 2002 WL 31133027, at *3 & n.2 (S.D.N.Y. Sept. 25, 2002) (Mukasey, C.J.) ("Given plaintiffs' legitimate reasons for bringing suit in this forum, and given defendants' representations to the MDL panel, plaintiffs' choice of forum is entitled to strong deference under the Circuit's sliding-scale approach in *Iragorri* [and] *DiRienzo II* . . . . notwithstanding the fact that plaintiffs are acting in a representative capacity."). One district court, citing *DiRienzo II* and denying a *forum non conveniens* motion, recited the following contradictory formula: although representative plaintiffs' choice of forum "is entitled to somewhat less deference," "defendant must nevertheless make a clear showing that litigation would be vexatious and oppressive out of all proportion to plaintiffs' convenience in order to overcome the presumption in favor of plaintiffs' choice of forum." *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, Nos. 01 Civ. 6554, MDL 1428(SAS), 2002 WL 1822741, at *8 (S.D.N.Y. Aug. 8, 2002). In the land of motives, limited deference equals . . . full deference.

favors" dismissal. Thus, this case falls squarely within the scope of this Court's Rule 10(c), authorizing a grant of certiorari where "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."[8]

3. As the petition noted (Pet. 29-30 & nn.14-15), the district courts are sharply divided on the application of *Koster* to class action plaintiffs' choice of forum. Respondents contend that because there is no circuit split on the issue of the deference due the choice of forum by a securities class action plaintiff[9], "there is no justification for this Court's review of the decision below." Opp. 25.[10]

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[8] Respondents contend that by citing *Williams v. Green Bay & Western Railroad Co.*, 326 U.S. 549 (1946), *Koster* itself somehow recognizes a distinction between derivative and class actions for purposes of the degree of deference due a plaintiff's choice of forum (Opp. 27). *Williams*, however, held no more than that *forum non conveniens* dismissal is not available where the *only* factor supporting dismissal is that the defendant is incorporated under the law of another jurisdiction, and nothing in the decision addresses the appropriate level of deference. *Koster* cites *Williams* and another case solely to establish that dismissal is not required merely because a lawsuit may necessitate a review of the internal affairs of a corporation chartered in another jurisdiction.

[9] Respondents misstate the issue as whether *Koster* requires diminished deference only in the context of *securities* class actions. Opp. 23-28. To the contrary, the question presented encompasses all class actions, as there is no logical basis for varying the degree of deference to a representative plaintiff's choice of forum based on the substance of the underlying claim.

[10] Respondents cite *Taylor v. United States*, 493 U.S. 906, 907 (1989) (Stevens, J.), for the proposition that without a circuit split there is no basis for certiorari. Respondents neglect to disclose that *Taylor* is not an opinion of the Court, but rather the opinion of a single Justice commenting on a denial of certiorari. Moreover, in that case, the unpublished lower court decision had no precedential weight and would work no further mischief, because the same appellate court at the same time issued a published decision reaching the opposite result on the same issue.

Respondents ignore the text of this Court's Rule 10 as well as this Court's longstanding practice of resolving important issues of federal practice and procedure even in the absence of a divergence of lower court authority. Rule 10(a), for example, contemplates certiorari review where "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." And, as noted above, the conflict with *Koster* warrants certiorari under Rule 10(c). Moreover, if this Court considers the deference issue with respect to class actions potentially distinguishable from the derivative action context in *Koster*, Rule 10(c) authorizes certiorari review where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court."

Review of the decision below is thus entirely consistent with this Court's certiorari jurisprudence. *See, e.g., Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (addressing propriety of self-transfer under 28 U.S.C. § 1407 even though lower court practice had been uniform); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (addressing applicability of Federal Rule of Civil Procedure 23 standards to settlement classes despite apparent absence of circuit split); *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari, *inter alia*, "because of the disarray among the Federal District Courts"). The district courts are deeply divided on the application of *Koster* to class actions, and this Court's guidance is needed to resolve this important issue of federal procedural law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BRAD S. KARP
MICHAEL E. GERTZMAN
ANDREW TAUBER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, N.Y. 10019-6064
(212) 373-3000

Counsel for the Underwriter Petitioners

CHARLES W. SCHWARTZ
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, TX 77002-6760
(713) 758-2222

Counsel for Petitioner William E. Haynes

GERALD A. NOVACK
DAVID S. VERSFELT
KIRKPATRICK & LOCKHART LLP
599 Lexington Avenue
New York, N.Y. 10022-6030
(212) 536-3900

Counsel for Petitioners Allen Fracassi, Philip Fracassi, Marvin Boughton, John Woodcroft, and Colin H. Soule

MICHAEL S. FELDBERG
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, N.Y. 10022
(212) 756-2000

Counsel for Petitioner Norman Foster

JACK M. WEISS
Counsel of Record
JOHN T. BEHRENDT
MARSHALL R. KING
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, N.Y. 10166-0193
(212) 351-4000

Counsel for Petitioner Deloitte & Touche LLP

THOMAS G. HUNGAR
PAUL DECAMP
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Petitioner Deloitte & Touche LLP

STUART L. SHAPIRO
MICHAEL I. ALLEN
SHAPIRO MITCHELL FORMAN
ALLEN & MILLER LLP
380 Madison Avenue
New York, N.Y. 10017
(212) 972-4900

Counsel for Petitioners Howard L. Beck, Ray Cairns, Derrick Rolfe, Felix Pardo, and Herman Turkstra

CRAIG R. SMYSER
SMYSER KAPLAN & VESELKA LLP
2300 NationsBank Center
700 Louisiana Street
Houston, TX 77002
(713) 221-2300

Counsel for Petitioner Robert L. Knauss

October 28, 2002